

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

JERRY L. APPLEMAN

PLAINTIFF

v.

CIVIL NO. 05-5011

JO ANNE B. BARNHART, Commissioner
Social Security Administration

DEFENDANT

ORDER

Plaintiff Jerry L. Appleman, appealed the Commissioner's denial of benefits to this court. On March 14, 2006, judgment was entered remanding plaintiff's case to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g). (Doc. # 8). Plaintiff now moves for an award of \$2,320.46 in attorney's fees and costs under 28 U.S.C. § 2412, the Equal Access to Justice Act (hereinafter "EAJA"), requesting compensation for 11.50 attorney hours of work before the court at an hourly rate of \$180.13, and 4.15 paralegal hours at an hourly rate of \$60.00. (Doc. # 9-12). The defendant has filed a response, expressing objections to both the hourly rate and certain hours requested. (Doc. # 13).

Pursuant to 28 U.S.C. § 2412(d)(1)(A), the court must award attorney's fees to a prevailing social security claimant unless the Commissioner's position in denying benefits was substantially justified. The burden is on the Commissioner to show substantial justification for the government's denial of benefits. *Jackson v. Bowen*, 807 F.2d 127, 128 (8th Cir. 1986). Under *Shalala v. Schaefer*, 509 U.S. 292, 302 (1993), a social security claimant who obtains a

sentence-four judgment reversing the Commissioner's denial of benefits and remanding the case for further proceedings is a prevailing party.

An award of attorney's fees under the EAJA is appropriate even though at the conclusion of the case, plaintiff's attorney may be authorized to charge and collect a fee pursuant to 42 U.S.C. § 406(b)(1). Recovery of attorney's fees under both the EAJA and 42 U.S.C. § 406(b)(1) was specifically allowed when Congress amended the EAJA in 1985. *Gisbrecht v. Barnhart*, 535 U.S. 789, 796, 122 S.Ct. 1817, 1822, 152 L.Ed.2d 996 (2002), citing Pub.L. 99-80, § 3, 99 Stat. 186 (1985).

To permit a fee award under the EAJA, assuming, of course, that the necessary standard is met, in addition to that allowed by the district court out of a claimant's past-due benefits does no more than reimburse the claimant for his or her expenses and results in no windfall for the attorney.

Meyers v. Heckler, 625 F.Supp. 228, 231 (S.D.Ohio 1985). Furthermore, awarding fees under both acts facilitates the purposes of the EAJA, which is to shift to the United States the prevailing party's litigation expenses incurred while contesting unreasonable government action. *Id.* See also, *Cornella v. Schweiker*, 728 F.2d 978 (8th Cir.1984).

In determining a reasonable attorney's fee, the court will in each case consider the following factors: time and labor required; the difficulty of questions involved; the skill required to handle the problems presented; the attorney's experience, ability, and reputation; the benefits resulting to the client from the services; the customary fee for similar services; the contingency or certainty of compensation; the results obtained; and the amount involved. *Allen v. Heckler*, 588 F.Supp. 1247 (W.D.N.Y. 1984).

However, the EAJA is not designed to reimburse without limit. *Pierce v. Underwood*, 487 U.S. 552, 573 (1988). The district court is "in the best position to evaluate counsel's services and fee request, particularly when the court has had the opportunity to observe firsthand counsel's representation on the substantive aspects of the disability claim." *Hickey v. Secretary of HHS*, 923 F.2d 585, 586 (8th Cir.1991), quoting *Cotter v. Bowen*, 879 F.2d 359, 361 (8th Cir.1989). The court can determine the reasonableness and accuracy of a fee request, even in the absence of an objection by the Commissioner. *See Decker v. Sullivan*, 976 F.2d 456, 459 (8th Cir.1992) ("Although the issue was not raised on appeal, fairness to the parties requires an accurately calculated attorney's fee award.").

The Contract with America Advancement Act of 1996, passed on March 29, 1996, amended the EAJA and increased the statutory ceiling for EAJA fee awards from \$75.00 to \$125.00 per hour. *See* 28 U.S.C. § 2 412(d)(2)(A).

The EAJA further requires an attorney seeking fees to submit "an itemized statement...stating the actual time expended and the rate at which fees and other expenses were computed." 28 U.S.C. § 2412(d)(1)(B). Attorneys seeking fees under federal fee-shifting statutes such as the EAJA are required to present fee applications with "contemporaneous time records of hours worked and rates claimed, plus a detailed description of the subject matter of the work." *Id.* Where documentation is inadequate, the court may reduce the award accordingly. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

Plaintiff's attorney requests an award under the EAJA at \$180.13 per hour, for the 11.50 hours which he asserts he devoted to the representation of plaintiff in this court. The party

seeking attorney fees bears the burden of proving that the claimed fees are reasonable. *Hensley v. Eckerhart*, 461 U.S. at 437.

Attorney's fees may not be awarded in excess of \$125.00 per hour - the maximum statutory rate under § 2412(d)(2)(A) - unless the court finds that an increase in the cost of living or a special factor such as the limited availability of qualified attorneys justifies a higher fee. 28 U.S.C. § 2412(d)(2)(A). The decision to increase the hourly rate is not automatic and remains at the discretion of the district court. *McNulty v. Sullivan*, 886 F.2d 1074 (8th Cir. 1989). In *Johnson v. Sullivan*, 919 F.2d 503 (8th Cir. 1990), the court stated that the hourly rate may be increased when there is "uncontested proof of an increase in the cost of living sufficient to justify hourly attorney's fees of more than \$75.00 an hour," such as a copy of the Consumer Price Index. Plaintiff's counsel attached a summary of the Consumer Price Index as an exhibit (Doc. # 11) and has presented evidence of an increase in the cost of living. Therefore, the undersigned believes his argument for enhanced fees based on a cost of living increase has merit.

The Commissioner has raised an objection to the hourly rate requested. We agree that the rate requested is too high and find that an award based upon an hourly rate of \$148.00 per hour, reflecting an increase in the cost of living, will result in consistent hourly fee awards in cases in Arkansas. See *Johnson v. Sullivan*, 919 F.2d 503, 505 (8th Cir. 1990). Thus, based upon the above factors, we find that an appropriate hourly rate for the award of attorney's fees in this case is \$148.00 per hour.

As to the number of hours plaintiff's counsel seeks compensation, defendant objects to the time submitted for duties generally completed by office staff. Plaintiff's counsel seeks 0.50 paralegal hour on January 19, 2005 (type district court complaint), from which we deduct 0.50

hour; 0.25 paralegal hour on January 20, 2005 (complete and file district court complaint), from which we deduct 0.25 hour; 0.50 paralegal hour on January 27, 2006 (type summons transmittal letters), from which we deduct 0.50 hour; 0.10 paralegal hour on January 27, 2006 (CC complaint and consent to client), from which we deduct 0.10 hour; 0.50 paralegal hour on February 10, 2005 (type affidavit of completion of service), from which we deduct 0.50 hour; 0.10 paralegal hour on February 14, 2005 (CC affidavit of completion of service to client), from which we deduct 0.10 hour; 0.10 paralegal hour on March 24, 2005 (CC answer from US Attorney), from which we deduct 0.10 hour; 0.10 paralegal hour on April 23, 2006 (CC plaintiff's appeal brief to client), from which we deduct 0.10 hour; 0.50 paralegal hour on April 27, 2006 (review time logs for client), from which we deduct 0.50 hour; 1.00 paralegal hour on April 27, 2006 (prepare draft of EAJA fee application), from which we deduct 1.00 hour; and 0.50 paralegal hour April 28, 2006 (complete EAJA fee application and review with client), from which we deduct 0.50 hour. Defendant argues that this work is not compensable under the EAJA because it could have been performed by support staff. *Granville House, Inc. v. Department of HEW*, 813 F.2d 881, 884 (8th Cir.1987) (work which could have been completed by support staff is not compensable under the EAJA). We agree and find that the time submitted on the above referenced dates is not compensable under the EAJA. Accordingly, we deduct 4.15 paralegal hours from the total number of compensable hours sought.

Plaintiff's counsel submitted 0.25 hour on January 27, 2005 (consent to exercise of jurisdiction to magistrate); 0.25 hour on February 2, 2006 (review mail, assigned to magistrate); and 0.25 hour on March 24, 2005 (review mail, answer from US Attorney). This court concludes that the time submitted on the above referenced dates should not have taken an attorney

experienced in handling social security cases more than five or six minutes to review these documents. *Bowman v. Secretary of H.H.S.*, 744 F.Supp 898 (E.D.Ark. 1989). Therefore we are reducing the 0.25 hour submitted on each of these dates to 0.10 hour. Accordingly, 0.45 hour must be deducted from the total compensable time sought by counsel.

Accordingly, we find that counsel is entitled to compensation under the EAJA for: 11.05 (11.50-0.45) hours for attorney's fees, at the rate of \$148.00 per hour, for a total attorney's fee award of \$1,635.40. This amount should be paid in addition to, and not out of, any past due benefits which plaintiff may be awarded in the future.

The parties are reminded that the award herein under the EAJA will be taken into account at such time as a reasonable fee is determined pursuant to 42 U.S.C. § 406, in order to prevent double recovery by counsel for the plaintiff.

IT IS SO ORDERED this 7th day of June 2006.

/s/ Beverly Stites Jones
HON. BEVERLY STITES JONES
UNITED STATES MAGISTRATE JUDGE